

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

No. 74-2629

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MYERS & MYERS, INC., ET AL.,

Plaintiffs-Appellants,

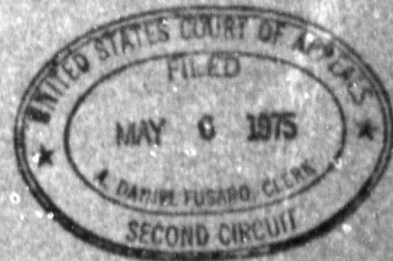
v.

UNITED STATES POSTAL SERVICE, ET AL.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEES



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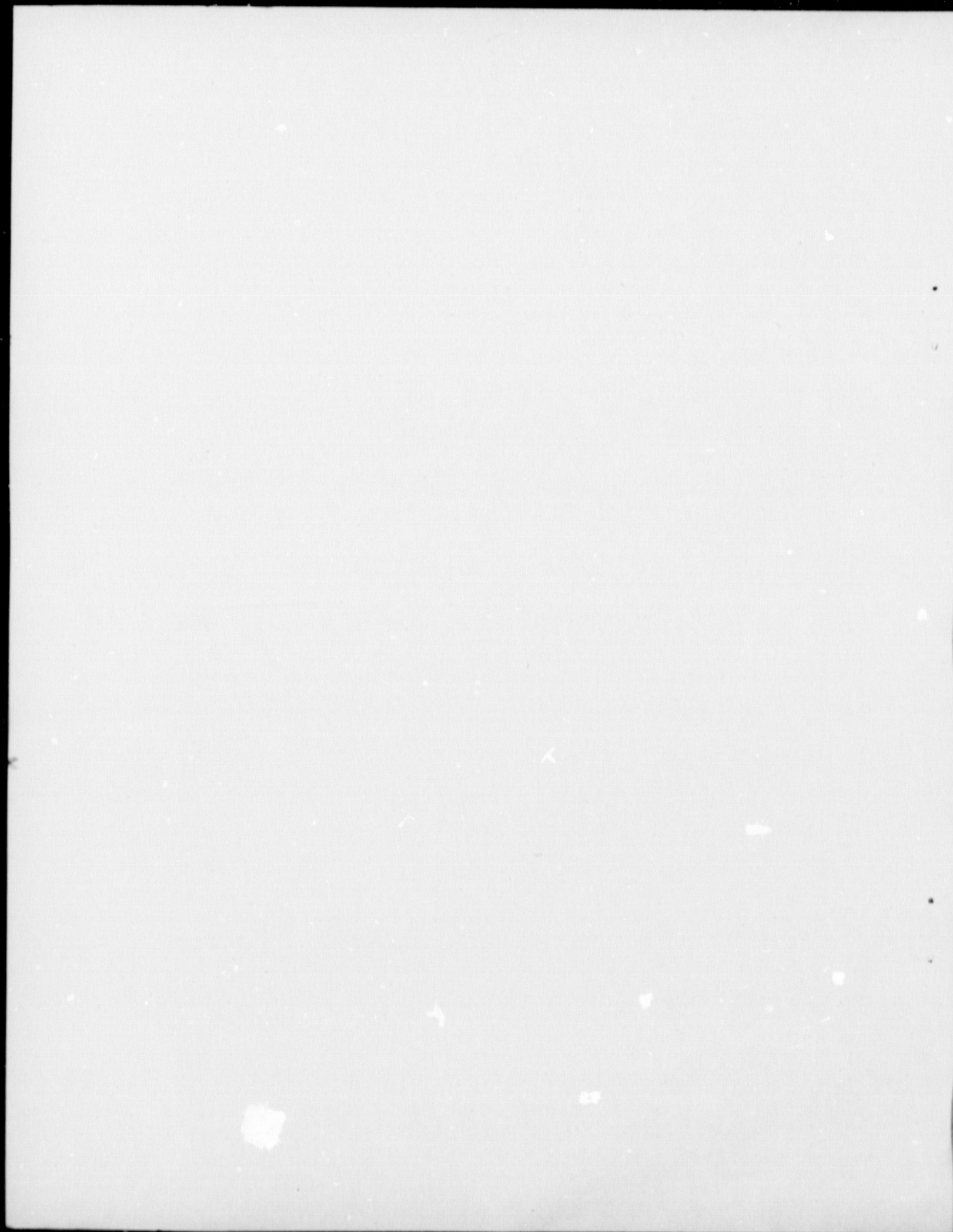
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v.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE APPELLEES

QUESTION PRESENTED

Whether the United States is answerable in damages under the Federal Tort Claims Act for the discretionary decision of postal officials not to renew expiring "star route" contracts.

STATEMENT

Plaintiffs-appellants ["Myers"] contracted with the United States Postal Service to transport mail by truck on six "star routes" in upstate New York. More than a month prior to the date the contracts were due to expire, postal officials notified Myers that the contracts would

not be renewed. Myers commenced this action under the Federal Tort Claims Act, 28 U.S.C. 1346(b), et seq., alleging that the decision not to renew damaged it in the total amount of \$173,000. The district court dismissed the action for want of jurisdiction, and Myers appeals.

1. "Star Route" Contracts.

The United States Postal Service is authorized by 39 U.S.C. 5005(a)(4) to contract with private persons for surface and water transportation of mail. The surface routes covered by such private contractors are often called "star routes", because the trucks used by the contractors usually bear the familiar star insignia.

Prior to 1948, star route contracts were not renewable. Upon expiration they were let out for competitive bidding and awarded to the low bidder. This practice led to much abuse. In particular, star route contract holders, who made substantial personal investment in equipment to carry the mail, frequently lost their routes to "cutthroat" competitors who underbid them by a few dollars and then renegotiated the contract price. H.R. Rep. No. 2003, 80th Cong., 2d Sess. 2-3 (1948). In order to eliminate the "insecurity" of the star route contractors, id., Congress passed legislation to enable the Postmaster General "in his discretion" to renew star route contracts "by mutual agreement" with the contract holders. Act of June 19, 1948, ch. 500, 62 Stat. 477.

This renewal authority is retained today by the United States Postal Service pursuant to 39 U.S.C. 5005 (b)(2),

2. The Facts of This Case.

Myers held contracts for the surface transportation of mail in upstate New York over six star routes. The contracts for these routes were due to expire on June 30, 1973 (App. 37-42). On May 16, and May 17, 1973 defendants-appellees William E. Peck and G. William Delamar gave Myers written notice that the Postal Service had decided not to renew the contracts for the six routes (Id.). The contracts were let out for competitive bidding, and Myers was eventually awarded two of the routes as low bidder. ^{1/} This action followed.

3. The Proceedings Below.

Myers brought this action for damages of \$173,000 under the Federal Tort Claims Act, 28 U.S.C. 1346(b), et seq., on the first day of April, 1974 (Complaint). Essentially, the "tort" alleged was the decision not to renew the star route contracts, which Myers claimed resulted from an erroneous investigation of its postal activities. This was translated into six "causes of action":

(1) "refusal and failure to negotiate and renew" resulting from "negligent, willful, reckless and discriminatory acts or omissions" in connection with the investigation and the decision not to renew (Complaint, ¶ 20);

^{1/} Initially the Postal Service rejected Myers' two low bids (App. 43-44). The rejections were later reversed, however.

(2) "refusal to negotiate and renew" caused by "negligent misrepresentations" (Complaint, ¶ 25);

(3) "negligent, willful, reckless, and discriminatory acts or omissions in connection with the two star route contracts" which were initially denied, but eventually awarded, to Myers after competitive bidding (Complaint, ¶ 38);

(4) "intentional infliction" of "mental distress, mental anguish, and emotional and mental upset" by, inter alia, the "decision not to negotiate and renew" and the investigation (Complaint, ¶¶ 39-40, 42);

(5) engagement in a "course of conduct", including the decision "to refuse to negotiate and renew" and the investigation, with intent to injure (Complaint, ¶¶ 43-44, 51);

(6) "violation and denial" of "civil rights" stemming from the investigation and the decision not to renew (Complaint, ¶¶ 52-53).

The Government moved to dismiss the complaint for lack of subject matter jurisdiction on July 15, 1974. After hearing oral argument on the motion, the district court on September 28, 1974 granted it, and dismissed the complaint for want of jurisdiction (App. 45-46).

STATUTES INVOLVED

The Federal Tort Claims Act, 28 U.S.C. 1346(b), et seq. (1970) provides in pertinent part:

28 U.S.C. 1346(b):

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2679(a):

The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

28 U.S.C. 2680:

The provisions of this chapter and section 1346(b) of this title shall not apply to --

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * * * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

* * * * *

39 U.S.C. 409(c) (1970) provides:

The provisions of chapter 171 and all other provisions of title 28 relating to tort claims shall apply to tort claims arising out of activities of the Postal Service.

39 U.S.C. 5003 (1970) provides in relevant part:

(a) The Postal Service may obtain mail transportation service --

* * * * *

(4) by contract from any person (as defined in section 5201(7) of this title) or carrier for surface and water transportation under such terms and conditions as it deems appropriate, subject to the provisions of this section.

(b)(1) Contracts for the transportation of mail procured under subsection (a)(4) of this section shall be for periods not in excess of 4 years (or where the Postal Service determines that special conditions or the use of special equipment warrants, not in excess of 6 years) and shall be entered into only after advertising a sufficient time previously for proposals. The Postal Service, with the consent of the holder of any such contract, may adjust the compensation allowed under that contract for increased or decreased costs resulting from changed conditions occurring during the term of the contract.

(2) A contract under subsection (a)(4) of this section may be renewed at the existing rate by mutual agreement between the contractor or subcontractor and the Postal Service.

* * * * *

(c) The Postal Service, in determining whether to obtain transportation of mail by carrier or person under subsection (a)(1) of this section, by contract under subsection (a)(4) of this section, or by Government motor vehicle, shall use the mode of transportation which best serves the public interest, due consideration being given to the cost of the transportation service under each mode.

ARGUMENT

THE UNITED STATES IS NOT ANSWERABLE IN DAMAGES
UNDER THE FEDERAL TORT CLAIMS ACT FOR THE
DISCRETIONARY DECISION OF POSTALS OFFICIALS
NOT TO RENEW MYERS' STAR ROUTE CONTRACTS

The United States may not be sued without its consent. By virtue of the Federal Tort Claims Act, consent has been granted to bring money damage actions against the United States under defined circumstances, but subject to specified exceptions enumerated at 28 U.S.C. 2680. The district court properly dismissed Myers' complaint for want of jurisdiction under the Federal Tort Claims Act, since Myers' claims are excluded by 28 U.S.C. 2680(a) and (h).

A. Myers' Claims are Excluded Under the Federal Tort Claims Act Because They are Based upon the Exercise or Performance of a Discretionary Function.

The second clause of 28 U.S.C. 2680(a) excludes under the Federal Tort Claims Act any claim

based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Notwithstanding the linguistics of the six "causes of action", Myers admits that "[t]his action is based on

the defendants' failure to renew six star route contracts between plaintiff, Myers & Myers, Inc., and defendants" (Brief for Plaintiffs-Appellants, p. 2). Since 39 U.S.C. 5005(b)(2) provides that star route contracts "may be renewed" upon "mutual agreement" between the contractor and the Postal Service, the decision by postal officials whether to agree to renew is plainly discretionary, and the Government cannot be answerable in money damages for the exercise of this discretion. ^{2/}

1. As the Supreme Court observed in the leading case of Dalehite v. United States, 346 U.S. 15, 34 (1953), the concept of protecting "the discretion of the executive or the administrator to act according to [his or her] judgment of the best course" is one of "substantial historical ancestry in American law". It is this discretion, which the Supreme Court held in Dalehite includes "determinations made by executives or administrators in establishing plans, specifications or schedules of operations", 346 U.S. at 35-36, whose exercise by federal officials cannot be the basis of an action for

^{2/} Apart from the United States, Myers named the United States Postal Service, the United States Postal Inspection Service, William G. Delamar, and William E. Peck as defendants. However, since Myers alleges that its claims are cognizable solely under the Federal Tort Claims Act, it is barred from suing the Postal Service or the Inspection Service eo nomine by 28 U.S.C. 2679(a). Edelman v. Federal Housing Authority, 382 F. 2d 594, 596 (C.A. 2, 1967). See also 39 U.S.C. 409(c). Furthermore, the Federal Tort Claims Act does not provide jurisdiction for its claims against the individual defendants, Delamar and Peck, so that those claims are barred as well. Even if a jurisdictional basis had been alleged to support the

(Footnote cont'd. on p. 9)

money damages under the Federal Tort Claims Act. "Where there is room for policy judgment and decision there is discretion." 346 U.S. at 36.

The legislative history of the discretionary function exception confirms that it was specifically designed by Congress to preclude tort actions as a means of testing the discretion exercised by federal agencies. The pertinent legislative reports state:

This is a highly important exception, intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity, such as a flood-control or irrigation project, where no negligence on the part of any Government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious, or that the statute or regulation authorizing the project was invalid. * * * To take another example, claims based upon an allegedly negligent exercise by the Treasury Department of the blacklisting or freezing powers are also intended to be excepted. The bill is not intended to authorize a suit for damages to test the validity of or provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion. Nor is it desirable or intended that the constitutionality of legislation, or the legality of a rule or regulation should be tested through the medium of a damage suit for tort.

H.R. Rep. No. 1287, 79th Cong., 2d Sess. 5-6 (1945); S. Rep. No. 1196, 77th Cong., 2d Sess. 7 (1942); H.R. Rep. No. 2245, 77th Cong., 2d Sess. 10 (1942).

2/ (Cont'd.) claims against the individuals they would be barred by the doctrine of official immunity, since they involve acts or omissions by postal officials carrying out their official functions. See Barr v. Matteo, 360 U.S. 564 (1959); Spalding v. Vilas, 161 U.S. 483, 498-499 (1896); Ove Gustavsson Contracting Co. v. Floete, 299 F. 2d 655, 658 (C.A. 2, 1962).

2. The rationale of the discretionary function exception, and the principle of Lehite, are directly applicable here. In deciding whether to renew star route contracts, postal officials must exercise subjective judgment and weigh a number of policy factors, including the prior performance of the present contractor, changes in the nature of the routes, and the needs of postal users. Additionally, in determining whether the renewal of a particular star route contract "best serves the public interest" postal officials are bound by 39 U.S.C. 5005(c) to give "due consideration" to the cost of carrying the mail under alternative modes of transportation. Plainly the exercise of discretion by postal officials in this case, in deciding not to renew Myers' star route contracts and to let them out for competitive bidding, is the type of governmental policy function protected from a damage action under the Federal Tort Claims Act.

3. A consistent line of decisions also demonstrates that Myers' claim falls within the discretionary function exception. For example, in Gowdy v. United States, 412 F. 2d 525 (C.A. 6), certiorari denied, 396 U.S. 960 (1969), the court of appeals ruled that the award of government contracts involves the exercise or performance of a discretionary function and may not form the basis for a damage action under the Federal Tort Claims Act. Accord, Lipka v. United States, 249 F. Supp. 213 (N.D. N.Y., 1965), affirmed on other grounds, 369 F. 2d 288

(C.A. 2, 1966), certiorari denied, 387 U.S. 935 (1967). See also Galbraith v. United States, 296 F. 2d 631, 632 (C.A. 2, 1961); Wooldridge Mfg. Co. v. United States, 235 F. 2d 513 (C.A.D.C.), certiorari denied, 351 U.S. 989 (1956).

Myers' reliance upon Hendry v. United States, 418 F. 2d 774 (C.A. 2, 1969), to support its argument that the discretionary function exception does not apply here (Brief for Plaintiffs-Appellants, pp. 11, 25), is entirely misplaced. That case involved a suit by a seaman claiming negligence and malpractice in the conduct of psychiatric examinations by government doctors. It was held that the suit was not barred by the discretionary function exception because the doctors were not engaged in any policy making, and were not exercising any discretion conferred by statute or regulation. Rather, they were simply making the type of medical judgments made by any doctor in private practice. In contrast, here the postal officials made important policy decisions by exercising the discretion expressly conferred upon them by statute.

B. Myers' Claims are Also Excluded under the Federal Tort Claims Act Because They Arise out of Interference with Contract Rights.

Since Myers' claims that the postal officials tortiously failed to renew its star route contracts, thereby depriving Myers of the opportunity of continuing in business on those star routes, its complaint may be read as alleging a "business tort" of interference with prospective economic advantage. But such a tort is

"simply an extension of the tort liability for interference with existing contractual relations," Dupree v. United States, 264 F. 2d 140, 143 (C.A. 3, 1958), certiorari denied, 361 U.S. 823 (1959), and "is governed by the same principles." Small v. United States, 333 F. 2d 702, 704 (C.A. 3, 1964). Under 28 U.S.C. 2680(h), claims "arising out of * * * interference with contract rights" are specifically excluded from the Federal Tort Claims Act. Accordingly, Myers' complaint, to the extent that it seeks to recover for interference with prospective economic advantage, is barred by 28 U.S.C. 2680(h). Small v. United States, supra; Kanarek v. United States, 314 F. 2d 802 (Ct. Cl. 1963), certiorari denied, 379 U.S. 838 (1964); Dupree v. United States, supra; Boruski v. Division of Corporate Finance, 321 F. Supp. 1273 (S.D. N.Y., 1971) (Weinfeld, J.).

This Court applied the above principle in Edelman v. Federal Housing Authority, 382 F. 2d 594 (C.A. 2, 1967). An unsuccessful bidder for property owned by the FHA brought an action against the FHA for, inter alia, damages under the Federal Tort Claims Act. He alleged that the FHA tortiously deprived him of the opportunity to fairly bid for, and purchase, the property. This Court held that the claim was cognizable solely against the United States under the Federal Tort Claims Act, and was barred by 28 U.S.C. 2680(h).

Hendry v. United States, supra, relied upon by Myers to defeat the application here of 28 U.S.C. 2680(h)

(Brief for Plaintiffs-Appellants, pp. 30-32), is inapposite. It was there held that it would be a "strain" on the language of 28 U.S.C. 2680(h) to analogize the claim of lost wages based on medical malpractice "to the rather different facts which normally give rise to private actions for interference with contract rights." 418 F. 2d at 779. Here, on the other hand, it is no "strain" at all to hold that Myers' claims, to the extent they may be read as alleging a "business tort" of interference with prospective economic advantage, are encompassed within the exception of 28 U.S.C. 2680(h).

C. Myers' Claims are Also Excluded under the Federal Tort Claims Act Because They are Based upon the Execution of a Statute.

Myers argues that its money damage claim should have been entertained by the district court under the Federal Tort Claims Act because postal officials failed to provide it with notice and an opportunity to be heard prior to deciding not to renew the star route contracts (Brief for Plaintiffs-Appellants, pp. 33-36). Neither the governing statute, 39 U.S.C. 5005(b)(2), nor any applicable regulations, provide for notice or hearing prior to a decision not to renew a star route contract. Therefore, the gist of Myers' argument is that the statute under which the postal officials acted here violates the Due Process Clause of the Fifth Amendment by permitting the postal officials to act without prior notice and hearing. In other words, Myers is seeking, through the medium of an action for money damages under

the Federal Tort Claims Act, to test the constitutionality of 39 U.S.C. 5005(b)(2).

The first clause of 28 U.S.C. 2680(a) excludes under the Federal Tort Claims Act any claim

based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid
* * *.

This clause was added to the Act because "[i]t was not 'intended that the constitutionality of legislation * * * should be tested through the medium of a damage suit for tort'". Dalehite v. United States, supra, at 27. In terms this clause "bars tests by tort action of the legality of statutes and regulations." Id. at 33.

Therefore, Myers' claim for money damages based on the absence of notice and hearing prior to the decision not to renew the star route contracts is barred by 28 U.S.C. 2680(a). ^{3/}

In sum, since Myers' action for money damages was based solely on the Federal Tort Claims Act, and since the claims it alleges are barred by that Act, ^{4/} the district court properly dismissed the action for want of subject matter jurisdiction.

^{3/} We note in passing that Myers' constitutional attack is without merit. Board of Regents v. Roth, 408 U.S. 564 (1972); Rainbow Valley Citrus Corp. v. Fed. Crop Ins. Corp., 506 F. 2d 467 (C.A. 9, 1974) (Hufstedler, J.).

^{4/} Myers also alleges "negligent misrepresentations" (Complaint, ¶ 25) and "intentional infliction" of "mental distress, mental anguish, and emotional and mental upset" (Complaint, ¶¶ 40, 42). Claims based on "misrepresentation"

(Footnote cont'd. on p. 14)

CONCLUSION

For the foregoing reasons the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of April, 1975, I caused the foregoing brief to be served upon opposing counsel by mailing, postage prepaid, a copy to:

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4/ (Cont'd.) are expressly excluded under the Federal Tort Claims Act by 28 U.S.C. 2680(h). United States v. Neustadt, 366 U.S. 696 (1961). The claim of intentional infliction of mental distress is based in the complaint on the "decision not to negotiate and renew" the star route contracts (Complaint, ¶¶ 39-40), and is therefore barred by the discretionary function and interference with contract rights exceptions.